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IN THE

Supreme Court of the United States

October Term, 1961

No. 468

STEVEN I. ENGEL, *et al.*,
Petitioners,

v.

WILLIAM J. VITALE, JR., *et al.*,
Respondents.

On Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF OF THE AMERICAN ETHICAL UNION AS *AMICUS CURIAE*

HERBERT A. WOLFF
LEO ROSEN
285 Madison Avenue
New York 17, New York
Attorneys for
The American Ethical Union
Amicus Curiae

Of Counsel:
GREENBAUM, WOLFF & ERNST
NANCY F. WECHSLER

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The Interest of the American Ethical Union

This brief is submitted on behalf of the American Ethical Union pursuant to leave granted by this Court.

The American Ethical Union is a federation of Ethical Culture Societies and Groups in the United States, which, collectively, constitute a liberal religious fellowship known as the "Ethical Movement" or the "Ethical Culture Movement." There are twenty-eight Societies and Groups in

eleven states and the District of Columbia. Eight of these are located in New York State.

One of the parent petitioners in this case is a member of an Ethical Culture Society (R. 12). A fundamental tenet of the Ethical religion is the freedom of each individual to determine for himself whether or not to relate his religious aspirations to the existence of a Supreme Being.

> "Whether one does or does not believe in God, prayer or immortality, is one's own affair. Membership in an Ethical Society is not conditioned on acceptance or rejection of any one answer to such question. In the Ethical Movement the good life and the rights and duties of human beings are looked upon as stemming from man's relation to man in the family of mankind."
>
> (*Do You Know the Ethical Movement?*, pamphlet published by the American Ethical Union, 2 West 64th Street, New York 23, N. Y., p. 3.)

Recitation of the Regents' Prayer in a public school is thus a religious practice which is incompatible with the tenets of Ethical Culture.

ARGUMENT

The Regents' Prayer constitutes governmental preference for theism in violation of the First and Fourteenth Amendments.

The parties, and other *amici*, have fully covered in their briefs the history and case law relating to the Establishment clause of the First Amendment, and the basic principles demonstrating why the Regents' Prayer contravenes that clause. We will therefore not burden this Court by traversing the same ground, but will confine ourselves to placing before the Court considerations related to the effect of the decision below on adherents of a non-theistic religion, such as Ethical Culture.

Ethical Culture is one of those "religions in this country which do not teach what would generally be considered a belief in the existence of God." *Torcaso* v. *Watkins*, 367 U. S. 488 at 495 n. 11. This Court, in *Torcaso*, noted among other such religions Buddhism, Confucianism, Taoism and Secular Humanism.

In the brief *amicus curiae* presented by the American Ethical Union to this Court in *Torcaso* there was set forth an exposition of the characteristics and history of the Ethical Culture religion and its historic roots in the humanism and non-theism of the 18th and 19th centuries. There is no need to reiterate these facts, or the fact that Ethical Culture is a religion, as specifically recognized in *Torcaso*. [See also, *Washington Ethical Society* v. *District of Columbia*, 249 F. 2d 127 (D. C. Cir. 1957).]

While Ethical Culture is one of the "secularist" religions deriving in large part from the thinking of Franklin,

Paine, Jefferson, Emerson, Thoreau, Kant and others, some of the other non-theistic religions mentioned by the Court in *Torcaso* have different characteristics and different philosophic bases. Children of followers of those movements, however, like Ethical Culturists, are necessarily divided from children of followers of theistic religions by the Regents' Prayer. In addition, of course, there are the indeterminate number of children of parents who do not belong to any organized religion, and who may or may not accept the concept of prayer or of a Supreme Being. According to the *Statistical Abstract of the United States for 1961* (at p. 44), over one-third (37%) of the population was not affiliated with an organized religion as of 1959. While this figure does not of course show the proportion of persons in the United States who do not subscribe to the doctrines of the theistic religions, the statistics nevertheless suggest that this group is not insubstantial.

Ethical Culture neither categorically denies nor dogmatically affirms the existence of a Supreme Being. The Ethical Culture Movement includes members whose personal faith includes a Supreme Being, and those whose personal faith does not.

Ethical Culture believes, in the words of its founder, Felix Adler, that "It is the moral element contained in it that alone gives value and dignity to any religion." (Adler, *Creed and Deed*, 1886, p. 163.)

Appeal to the grace or benevolence of a Supreme Being is inconsistent with Ethical Culture, which holds that:

> "Religion, for all the various definitions that have been given of it, must surely mean the devotion of man to the highest ideal that he can conceive. And that ideal is a community of spirits in which the latent moral

potentialities of men shall have been elicited by their reciprocal endeavors to cultivate the best in their fellow men. What ultimate reality is we do not know; but we have the faith that expresses itself in the human world as the power which inspires in man moral purpose.

"Thus the 'God' that we love is not the figure on the great white throne, but the perfect pattern, envisioned by faith, of humanity as it should be, purged of the evil elements which retard its progress toward 'the knowledge, love and practice of the right.'"

(Muzzey, *Ethics as a Religion*, 1951, p. 95.)

The Ethical Culture Societies conduct services, and maintain religious schools for children which meet regularly on Sunday mornings. The Leaders of the Societies perform the functions of ministers, officiating at marriages and funerals and counselling members on moral and ethical problems. But the outward forms of worship characteristic of most theistic religion are rejected by Ethical Culture. As was stated by Felix Adler in the early days of the Movement:

"We propose to entirely exclude prayer and every form of ritual. Thus shall we avoid even the appearance of interfering with those to whom prayer and ritual, as a mode of expressing religious sentiment, are dear. And on the other hand we shall be just to those who have ceased to regard them as satisfactory and dispensed with them in their own persons."

(Address of May 15, 1876, quoted in "*Ideals at Work*," 1962, published by the American Ethical Union, 2 West 64th St., New York 23, N. Y., p. 1.)

Prayer never forms any part of the services conducted by an Ethical Culture Society. Nor is there ever any

organized appeal to a Supreme Being. Rather than teaching its followers to appeal to a personal God, Ethical Culture believes that "the appeal to conscience has ever been the lever that raised mankind to a higher plane of religion." (Adler, *Creed and Deed*, *op. cit. supra* at p. 164.)

Insofar as Ethical Culturists in the State of New York are concerned (and there are a substantial number of them), when the Regents' Prayer is recited in the classroom, state power is being exercised to subordinate their beliefs and religious practices to beliefs and religious practices approved by other sects. In direct opposition to the doctrine of the *Torcaso* case, the state is aiding "those religions based on a belief in the existence of God as against those religions founded on different beliefs." (*Torcaso* v. *Watkins*, *supra*, at 495.) This is so regardless of whether or not children of this or any other "non-conforming" religion are excused from participation in the religious ceremony which the state is conducting.

Recitation of this prayer under the aegis of state authority inevitably, by virtue of its official character, prefers certain religions over others. It is also an act of preference for the principle of religious observance over that of non-observance. The prayer is thus an "establishment of religion" in the literal sense of those words.

It is because practices like the Regents' Prayer do inevitably reflect official approval of some religious beliefs and official disapproval of other religious beliefs and of non-belief that the First Amendment forbids any "establishment of religion" and proscribes anything which makes religious observance a function of government.

The Regents' Prayer can be considered "non-sectarian" only in the sense that it is not directly adapted from the

ritual of any particular religious sect. That in no way diminishes its character as a prayer to a Supreme Being, or as a religious exercise of the state. The State of New York thus makes "public business of religious worship or instruction" in violation of the basic tenets of the Establishment clause (Mr. Justice Jackson, dissenting in *Everson v. Board of Education*, 330 U. S. 1, at 261).

The crux of the evil of officially sanctioned religious ceremony is that it is of necessity discriminatory and divisive. The action here under review has set a community at odds over a religious issue—precisely what the guaranty of religious freedom of the First Amendment was designed to prevent. This action of the state has imposed on the nonconforming school children a burden of dissociating themselves from official practice and has thus caused divisions in the school community along religious lines. The fact that the prayer is recited immediately after the Pledge of Allegiance to the Flag exacerbates these cleavages, particularly since it tends to suggest to the minds of the children that non-conformists are also unpatriotic. We believe that one of the aims of the First Amendment was to prevent such confusion of civil and religious values.

The action of the State of New York results in official distinctions among school children on religious grounds. It adversely affects adherents of Ethical Culture and all others who, for one reason or another, cannot conscientiously accept the State of New York's religious command. It offends against all members of the body politic, of whatever religious persuasion, by injecting religious controversy into the area of civil affairs.